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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2010 MAR -8 PM 4:02
JEANNE HICKS, CLERK
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	)	No. P1300CR20081339 Div. 6 **DEFENDANT'S SUPPLEMENTAL MEMORANDUM REGARDING SANCTIONS PURSUANT TO RULE 15.7**

MOTION

Steven DeMocker, by and through counsel, hereby respectfully files this supplemental memorandum in support of his previously filed motions for sanctions.[1]

[1] The defense has filed the following motions for sanctions: Motion to Preclude Late Disclosed Evidence, Witnesses and Experts and to Dismiss the Death Penalty as a Sanction Under Arizona Rule of Criminal Procedure 15.7; Motion to Preclude Late Disclosed UBS Evidence; Motion to Preclude State's Computer Forensic Experts and Reports; Motion to Preclude Evidence Offered regarding Late Sorenson Laboratory Forensic Testing; and

This motion does not request the exclusion of any additional witnesses or evidence.[2] Instead, the defense seeks to further detail and clarify the Court's authority under Rule 15.7 to impose sanctions and dismiss the death penalty. Counsel requests that the Court expedite its ruling on these previously filed motions. These motions are based on the Due Process Clause, the Fifth and Sixth Amendments, the Confrontation Clause, the Eighth Amendment and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Mr. DeMocker's prior motions have detailed the State's ongoing and extensive disclosure violations. The State's actions both individually and cumulatively have violated Mr. DeMocker's Fifth, Sixth, and Eighth Amendment rights, his rights under the Confrontation and Due Process Clauses and Arizona counterparts as well his rights under the Rules of Evidence and Criminal Procedure. The defense has asked the Court to preclude witnesses, evidence and experts that the State has either withheld and then late disclosed or has not disclosed at all in violation of Rule 15.1 and this Court's Orders.

The defense cannot prepare for trial until the Court has ruled on these motions. The defense does not know what evidence the State will be permitted to offer, what evidence will be excluded, what witnesses and experts will be permitted to testify, what experts the defense should engage, what evidence defense experts should review and analyze or how to divide the short ten weeks left before trial commences to prioritize the thousands of pages of ongoing late disclosed evidence and a witness list of over 140

Motion to Preclude Witnesses, for Attorney's Fees and for Other Sanctions, Including Dismissal of the Death Penalty filed on February 26, 2010.

[2] Based on just received supplemental disclosures, additional motions to preclude will likely be forthcoming after review and consideration.

lay witnesses. The defense asks that the Court expedite a hearing on these pending motions given the urgency of these issues and that trial is now less than two months away.

1. Sanctions Are the Responsibility of the Court.

The Arizona Supreme Court has declared that the trial court is responsible for imposing sanctions against the State for disclosure violations. "[W]e note that it is the trial court's responsibility to enforce our disclosure rules. ... When necessary, trial judges possess the power to invoke sanctions ... for failure to comply with discovery rules." *State v. Tucker,* 157 Ariz. 433, 441 (1988).The Court's discretion is very broad and includes any sanction the Court determines appropriate. The *Tucker* Court commented that when a prosecutor violates disclosure obligations, the trial court "is authorized to impose any sanction it finds just under the circumstances ..." *Tucker*, 157 Ariz. at 439 (internal quotation omitted).

The mechanism for imposing sanctions is Rule 15.7. Pursuant to Rule 15.7, a trial court has broad discretion in fashioning a sanction and will not be found to have abused its discretion "unless no reasonable judge would have reached the same result under the circumstances." *See State v. Armstrong*, 208 Ariz. 345, 354, 93 P.3d 1061, 1070 (2004) (citing *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983)).

2. Sanctions Are Mandatory Because the Prejudice is Severe.

The Court is required to order disclosure and impose a sanction under Rule 15.7 unless the Court finds either 1) that the information could not have been disclosed with due diligence and the information was disclosed immediately upon its discovery, or 2) that the State's failure to comply was harmless. It is clear that the evidence, experts and witnesses that were either late disclosed or have not been disclosed could have been disclosed earlier as they were in the State's possession and were not immediately

disclosed. The details with respect to each late disclosed witness, item of evidence and expert are laid out with dates and B ates numbers in the underlying motions.

Therefore, the Court must impose a sanction unless it finds that the State's repeated disclosure obligations and defiance of Court orders to disclose information were harmless. Such a finding is not possible. The prejudice to the defense from both the State's failures to disclose specific evidence, witnesses and experts and the cumulative effect of these failures is outlined in the underlying motions and cannot be overstated.

In summary, since the Court imposed a June 22, 2009 disclosure deadline in this case, the State has disclosed tens of thousands of pages of documents, over 70 CDs of interviews and over a dozen additional experts. The defense has been forced to alter its trial planning and schedule and strategy; attempt to quickly review and analyze the huge volume of late disclosed evidence; research and locate experts to review and critique the State's analysis; and also conduct independent expert analysis of the information. The defense has not been able to prepare for and interview the State's witnesses or otherwise prepare for trial because it is still sorting through evidence that is still coming in on a daily basis. (For example, 601 pages were disclosed on March 4, along with 7 CDs of documents, jail calls and interviews).

Some of the late disclosed evidence, witnesses and experts relate to wholly new areas of evidence. This includes newly disclosed evidence regarding shoe prints and shoe print impressions and tracking. These issues were already litigated. The State was in possession of, but did not disclose, relevant and potentially exculpatory evidence regarding shoe prints while the parties were litigating this very issue. Other newly disclosed areas include a cell tower expert and a "criminal behavior analyst." None of these "experts" have produced any report. Therefore the defense has not been able to interview these experts. In fact for some of the experts, the defense has no disclosure

whatsoever. The State continues to investigate and test (and in some cases re-test)items of evidence and has still not produced reports on the four hard-drives, and dozens of other computer forensic materials. The defense has, as a result, not been able to interview the State's five computer experts and prepare to confront the State's experts and evidence on computer forensics at trial.

The State's failure to comply with Rule 15.1 and provide timely disclosure has created immeasurable harm to Mr. DeMocker. A sanction is therefore required under Rule 15.7.

3. Factors to Consider When Imposing a Sanction Under 15.7.

In determining the appropriate sanction, Rule 15.7 requires that the Court consider the following:

- the significance of the information not timely disclosed,
- the stage of the proceedings at which the disclosure is ultimately made; and
- the impact of the sanction on the party and the victim.

The information not timely disclosed includes the following[3]:

- shoe print evidence, witnesses and an expert, Eric Gilkerson. The proposed precluded evidence is essentially that the shoe print impressions behind the victim's home most closely correspond with a brand of shoe that has a particular sole. The report at issue was requested by the State in September 2009 and disclosed to them by the FBI in October 2009. Although the issue of the shoe prints behind the victim's home was briefed to this Court by the parties in December 2009 and litigated with an evidentiary hearing and argument in January 2009, the State did not disclose the report or the expert to the defense until January 29, 2010, with less than three months to trial;

[3] This list from the previously referenced motions is not exhaustive, only illustrative,

- 23,000 pages of Mr. DeMocker's work emails that were not subpoenaed by the State until 14 months after Mr. DeMocker's arrest and disclosed with less than three months to trial, creating an impossibility that the defense could reasonably review this evidence in advance of trial;
- nineteen (19) items in the State's possession since July of 2008 that were sent for forensic testing to Sorenson Laboratory on February 17, 2010, after repeated orders by this Court requiring the State to identify what testing remained to be done by a certain date and their refusal to comply with these orders, disclosed with less than with approximately two months to trial with no results;
- no complete computer forensic reports with less than ten weeks to trial. The State waited four months to begin processing information off of several hard-drives seized in July of 2008 from Mr. DeMocker and the victim and also waited months before examining the hard-drive of James Knapp. Now the defense is made to suffer because the examinations are not complete. The State has also failed to disclose EnCase case files as requested which would permit defense experts to perform necessary evaluation of the State's experts incomplete computer forensics evaluations;
- 300 pages of DPS audits that were not produced until February 2010 after repeated requests which are necessary to evaluate the thousands of DPS reports. Complete refusal to comply with Court ordered disclosure of STR Frequency Tables necessary to evaluate DPS reports of DNA results;
- Disclosure of an expert "criminal behavior analyst" with less than three months to trial with no report, and no indication of how his testimony will

comply with this Court's order pursuant to motions in limine and 404(b) evidence;

- Cell tower information in the State's possession as of November 2009 which was previously requested by the defense and which the State previously told the defense did not exist, disclosed January 29, 2010, relating to the location of James Knapp at or near the time of the crime;
- A cell tower expert not disclosed until January 19, 2010, relating to the location of James Knapp at or near the time of the crime;
- Defendant's statements that were not identified as ordered by the Court that the State intends to rely on at trial. The State disclosed over 3000 jail calls but no summaries until January of 2010 – even though the State was preparing summaries in 2008. Even when the Court ordered identification of the calls, the State failed to identify the calls to the defense;
- No usable list of documents relied on by experts as required by Rule 15.1 and ordered by the Court for several experts, using categories like "all emails" and "summary of financial information";
- Crime scene diagrams repeatedly requested by the defense and not disclosed until January 2010, necessary for defense expert's evaluation of the crime scene; and
- A "forensic psychiatrist" disclosed in January of 2010, with no report, no usable comprehensive indication of what was relied upon, and no way to prepare to confront or rebut his opinions.

The State did not disclose these items until mere months before trial. These late disclosures are ongoing and, just at the end of last week, the defense received an additional 600 pages and 7 CDs of disclosure, plus an additional disclosure over the weekend. The defense has still not received the DPS Computer Forensic Reports. The

Court has set deadlines; the State has ignored them. The Rules set deadlines; the State has ignored them. The timing of these tens of thousands of pages of late-disclosed evidence have completely overwhelmed the capacity of the defense team to prepare for trial and to prepare to confront the State's evidence in the time remaining to trial. At some point the Court must ask, *when will it stop*?

The State answered this question last week when Mr. Butner advised the Court in the strongest of terms that his office was continuing to investigate the "unsolved aspects" of this case. Without even the slightest acknowledgement that late and continuing investigation was disadvantaging Mr. DeMocker, the State boldly asserted that what we have seen in the last months and weeks will continue. We suggest that no case should proceed to trial with life and death hanging in the balance when the State has not completed its investigation and is forced to recognized that important "unsolved" aspects of the case remain—including the identity of the male whose DNA has been scraped from beneath the victim's fingernails.

4. **Possible Sanctions**

Rule 15.7 provides the following possible, although not exhaustive, list of sanctions:

(1) Precluding or limiting the calling of a witness, use of evidence or argument in support of or in opposition to a charge or defense, or

(2) Dismissing the case with or without prejudice, or

(3) Granting a continuance or declaring a mistrial when necessary in the interests of justice, or

(4) Holding a witness, party, person acting under the direction or control of a party, or counsel in contempt, or

(5) Imposing costs of continuing the proceedings, or

(6) Any other appropriate sanction.

A. The Court Should Exclude Late Disclosed Witnesses, Evidence and Experts.

The defense acknowledges that preclusion of a witness is not a favored sanction because of the impact of the sanction on the party and the victim. However, where critical evidence is late disclosed, the Arizona Supreme Court has noted that preclusion of the evidence may be the appropriate remedy. *See State v. Moody*, 208 Ariz. 424, 454 *citing State v. Krone*, 182 Ariz. 319, 320-322 (1995) (reversing conviction based on failure to preclude late disclosed video of expert's key exhibit not disclosed until the eve of trial). Courts consider four factors when deciding whether to preclude a witness: (1) the importance of the witness to the case; (2) whether the opposing party will be surprised; (3) whether the discovery violation was motivated by bad faith; and (4) any other relevant circumstances. *State v. Smith,* 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984) (citation omitted); *accord State v. Delgado,* 174 Ariz. 252, 257, 848 P.2d 337, 342 (App.1993).

In this case, the specific factors with respect to each witness's importance, the surprise to the defense, and bad faith of the prosecution where they had the evidence and did not disclose it are outlined in the relevant motions.

The unique and important other relevant circumstance the Court should consider here is the *cumulative* and *ongoing* nature of the State's repeated disclosure violations. It is not the case that the defense is left to respond to one or two late disclosed witnesses or one or two late disclosed videos or documents. The late disclosure in this case is of an almost unimaginable volume and all at a very late date – with less than 10 weeks to trial and more disclosure coming in every week. This circumstance should weigh heavily on the Court's mind when considering whether to exclude evidence or preclude witnesses. These witnesses and exhibits have been specifically listed in the above referenced motions.

B. The Court Should Dismiss the Death Penalty Based on the State's Cumulative Disclosure Violations.

As a remedy for the cumulative effect of the ongoing disclosure violations in this case, the Court should dismiss the death penalty. Rule 15.7 permits the Court to impose "any other appropriate sanction" for disclosure violations. In considering the effects of this sanction, the State would still be able to seek a life sentence but would not be permitted to seek the ultimate sentence of death where it has repeatedly failed to follow the disclosure rules and orders of the Court. The Supreme Court in *Barrs v. Wilkinson* noted that although untimely notice of intent to seek the death penalty does not automatically preclude the State from seeking a death sentence, a continuance is not the only proper remedy and other available sanctions include preclusion of the death penalty. *Barrs v. Wilkinson*, 186 Ariz. 514, 924 P.2d 1033 (1996). *Barrs* dealt with penalties under the notice requirements and rejected a jurisdictional challenge on the failure to file a notice. A court need not find that other less stringent sanctions are not applicable to effect the ends of justice "where the only potential 'loss' to the criminal proceeding is a sentencing option." *Id.* Here the State would lose a sentencing option based on the cumulative effects of its failures to timely make disclosure as required under Rule 15.1. We have very much in mind this Court's statement during oral arguments on March 2 observing that it might be less disruptive to the State's case to remove the death penalty sanction than to interfere with the State's presentation of its case. This sanction would have a minimal effect on the presentation of the State's case but will still act as a sanction to ameliorate, in part, the devastating effects to Mr. DeMocker's rights. This remedy is particularly appropriate given the "death is different" jurisprudence. The United States Constitution requires that "'extraordinary measures [be taken] to insure that the [accused] is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.'" *Caldwell v. Mississippi,* 472 U.S. 320, 352 n.2 (1985)

(*quoting Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.") (*quoting Burger v. Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

This Court has the authority, the good cause, and the obligation to strike the death penalty as a sanction in this case. Whether seen strictly as a "sanction" or not, we urge that the case not be allowed to proceed as a death penalty case while the State's investigation continues and while the crime remains unsolved.

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court strike the death penalty and exclude other late disclosed evidence, witnesses and experts as appropriate.

DATED this 8th day of March, 2010.

By: _____

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COPIES of the foregoing hand delivered this this 8th day of March, 2010, to:

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